No. 2851

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United States
Circuit Court of Appeals
For the Ninth Circuit.

F. F. DOANE, Appellee,

vs.

CALIFORNIA LAND COMPANY, Appellant.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the Southern Division, District of California.

ALFRED A. FRASER,
Solicitor for Appellee.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE 42116

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STATEMENT.

This is an action commenced in the District Court of United States for the Southern Division of the District of California by the California Land Company, the appellee herein, versus F. F. Doane, the appellant.

The purpose of such action was to obtain a decree of the Court quieting the title of the complainant to certain lands in California against any claim, right, title or interest of the appellant, F. F. Doane.

The Complaint filed in the trial court is in the usual form of action to quiet title, and setting forth, among other facts, the necessary diversity of citizenship of the parties and that the amount involved is sufficient to give the Court jurisdiction of the action.

The appellant, F. F. Doane, appeared in the action and filed his answer, in which he sets forth two special defenses.

First: That there was a prior action pending in the State Court of California.

Second: That the organization of the California Land Company and transfer of the property to it was collusive, fictitious and merely for the purpose of conferring jurisdiction upon the Federal Courts.

Upon the merits of the case the answer set forth in effect that the complainant corporation derived its title under an instrument designated as a Trust Deed, but which the appellant claims to be in fact a mortgage. And he asked that the Court may decree him the right of possession to the premises and such other relief as may be just and equitable.

Upon these issues the cause was tried in the District Court, and a judgment made and entered in favor of the appellee company, quieting title as prayed for in its complaint.

ARGUMENT.

Taking up first the point raised by the defendant's answer, that there was a prior action pending in the State Court. We might dispose of this question by the mere examination of the record. The appellant's

Exhibit I (Tr. p. 85) is a copy of the record in the State Court and sets forth the parties to the action in the State Court, and also sets forth the purpose of this action, and the same discloses the fact that the parties to the action in the State Court are entirely different from the parties to this action, and the relief demanded is entirely different in each action. However, conceding for the sake of argument that the parties are the same, and that the issues are the same, and that the State Court had acquired jurisdiction of the parties, yet, we maintain this would constitute no defense or bar to the prosecution of this suit.

In the case of the City of Ironton vs. Harrison Const. Co., 212 Fed. 353, the Circuit Court of Appeals case, the Court say:

> "The city complains that this suit was not abated or at least stayed because of the prior suit in the State Court. Of this claim it is sufficient to say that there had been no final judgment in the State Court that the plea was therefore in effect not one of prior adjudication, but one of prior suit pending, and that a prior suit pending in the State Court will not abate the latter suit in a Federal Court even if between the same parties upon the same issues and even if the two courts are in the same district of the same state. City vs. Clark (C. C. A.), 62 Fed. 694; Bank vs. Stone, 88 Fed. 383. The request that this suit be stayed until the termination of the other case was at most an appeal to the discretion of the trial court, but it is not easy to see why the company did not have an absolute right that its case in the Federal Court should proceed to judgment. McClellan vs. Garland, 217 U. S. 268."

The facts in the case of McClellan vs. Garland, 217 U. S. 268, above referred to, are as follows: The Judge of the Circuit Court of the United States for the District of South Dakota made an order in an action therein pending, staying all proceedings in that Court to await a determination of another action between the same parties in a State Court. An application for mandamus was made to the Circuit Court of Appeals for the Eighth Circuit to compel the Circuit Judge to proceed and try the action notwithstanding the pendency of the action in the State Court. The Circuit Court of Appeals refused to issue the writ of mandamus, and the matter was taken by certiorari to the Supreme Court of the United States, and in the opinion of the Supreme Court in passing upon the questions say:

> "The rule is well recognized that the pendency of an action in the State Court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction, for both the State and Federal Courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a State Court may also have taken jurisdiction of the same case. In the present case, so far as the record before the Circuit Court of Appeals discloses the Circuit Court of the United States had acquired jurisdiction, the issues were made up, and when the State intervened, the Federal Court practically turned the case over for determination to the State Court. We think it had no authority to do this, and that the Circuit Court of Appeals, upon the record before it, should have issued the writ of mandamus to re-

quire the Judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case."

Again, in Barber Asphalt Company vs. Morris, 132 Fed. 945. Circuit Court of Appeals of the Eighth Circuit in the above case a writ of mandamus was issued to the trial Court ordering him to proceed and try the case notwithstanding the fact that a prior suit involving the same parties and same issues was pending in the State Court, and in this case the Court say:

> "The petitioner invoked the jurisdiction of the United States Circuit Court in an action to determine the simple question of debt or no debt between him and a citizen of another state. Actions for the same cause between the same parties were pending in the State Court. It was the duty of the Judge who held the Circuit Court to proceed with convenient speed to try and by means of the exercise of his own independent judgment to adjudicate the petitioner's controversy. He stayed all proceedings in the cause before him until that controversy should be finally determined by the Courts of the State. This stay deprived the petitioner of its rights to the independent judgment of the national Courts upon the merits of its action and destroyed the jurisdiction of this Court to review the adjudication which may be made upon it in the Court below."

The Circuit Court of Appeals for this Circuit has also announced the same rule. In the case of Bunker Hill Mining Company and Sullivan Mining Company vs. Shoshone Mining Company, 109 Fed. 508, Circuit Court of Appeals of the Ninth Circuit, the Court say:

"What effect, if any, should be given to the plea in relation to the pendency of the action in the State Court concerning the title of the Ibex and Kirby Fraction lodes, waiving all objection to the form of the plea and facing the question upon its merits as a plea in bar, and upon the theory as argued by appellee that both suits are between the same parties and involve the same issues. We are clearly of the opinion that it is wholly insufficent and that the Court erred in sustaining it. Although, in former years, there was considerable controversy and much conflict of opinion upon this point, it must now be considered as settled, that the pendency of a prior suit in a State Court can not be pleaded in bar to a suit in the Federal Court, even between the same parties and involving the same issues."

Under the most liberal rule, it has always been held that it is a matter entirely within the discretion of the trial Judge as to whether or not a case pending in the Federal Court should be abated or continued during the pendency of a similar action in the State Court, and under this rule the appellant is not entitled to any relief as the trial Judge exercised his discretion and denied the application.

Was the transfer of the property of the plaintiff corporation for the purpose only of conferring jurisdiction on the Federal Court?

We deem it to be a complete answer to this question to call the Court's attention to the facts as shown by the record, in the stipulation of facts, page 47, folio 54, Tr., it is stated:

"And it is also further admitted that the trustees, H. M. Coffin, John McMillan and F. H. Par-

> sons, trustees mentioned in the trust agreement and in the trustees' deed, have during all the times mentioned in the complaint been citizens and residents of the State of Idaho, and were not citizens or residents of the State of California."

These three persons just mentioned were the immediate grantors of the California Land Company. (Plaintiff's Exhibit "D," Tr. page 79.)

Now, the record shows that the immediate grantors of the California Land Company, all being residents of the State of Idaho, could have prosecuted this action in the United States Court in the same manner and to the same effect as the complainant company. Therefore, it was unnecessary to convey these lands to the California Land Company or to any other person in order to invoke the jurisdiction of the Federal Court.

In the case of Manhattan Life Ins. Co. vs. Broughton, 109 U. S. 121, the Court say:

> "Mrs. Ferguson, the assured and payee named in the policy, was herself a citizen of New Jersey, and as such, if no assignment had been made, might have sued the company in the Circuit Court of the United States; and Bromfield, a citizen of the same State, was appointed in the stead of the former trustee, a citizen of New York, not by Mrs. Ferguson's deed in pais, but by a Court of competent jurisdiction. Under these circumstances the mere fact that one object in having him appointed was to enable a suit to be brought in the Circuit Court is not sufficient to require or justify the construction that he was improperly, and it cannot be pretended that he was collusively, made a plaintiff for the purpose of creating a case cognizable by that Court. The question

involved was not a question of local law, but of general jurisprudence, upon which Mrs. Ferguson, and Broughton, as her trustee, had a right to seek the independent judgment of a Federal Court. Railroad Co. vs. Lockwood, 17 Wall. 357, 368; Mich. Cent. R. Co. vs. Myrick, 107 U. S. 102; (S. C. 1 Sup. Ct. Rep. 425) Burgess vs. Seligman, 107 U. S. 20 (S. C. 2 Sup. Ct. Rep. 10)."

In the case of Ashley vs. Board of Supervisors, 83 Fed. 534, Circuit Court of Appeals of the Eighth Circuit, in the opinion the Court say:

"We think it is very clear that, as these bonds were payable to bearer, if the transfer from the bank to Whitbeck was a real one, in good faith, and not colorable merely, and collusive, the jurisdiction of this Court cannot be defeated by reason of any objection that can be made to the transfer from Whitbeck to Ashley. Whitbeck being a citizen of the State of New York, if the transfer to him was a real one the case was then one properly within the jurisdiction of the Circuit Court, and the transfer from Whitbeck to Ashley could not create "a case cognizable or removable" in or to the Courts of the United States. The facts necessary to jurisdiction were already complete, unless the transfer from the bank to Whitbeck could be successfully assailed."

In Stanley vs. Board, 15 Fed. 493, the Court said:

"The demands in suit were first assigned to Mr. C. P. Williams, a citizen of this State. Williams thereafter assigned to the plaintiff, in circumstances which would probably require a dismissal of the suit, pursuant to the fifth section of the act of March 3, 1875, were it not for the fact that the Court had jurisdiction prior to and irrespective of the assignment. That the plaintiff's immediate assignor might have maintained this action, because the controversy is one arising 'un-

der the laws of the United States', was directly decided on the former trial, and is res adjudicata in this Court. The assignment was not made for the purpose of 'creating a case' within the jurisdiction of the Court, for such a case was already in existence. As the Court must, in any event, retain jurisdiction, an inquiry into the relations existing between the plaintiff and his assignor can lead to no tangible result. Where a party, who is entitled to sue in the Federal Courts, transfers his cause of action to another, who has the same right, of what moment is it that the transfer was for an adequate consideration, or was wholly without consideration, so long as the legal title is transferred? The defendant has no reasonable ground for complaint, and the Court, for whose advantage the statute was framed, has not been imposed upon or burdened with an improper or collusive controversy.

"What was thus said is applicable to the question here presented. In this view, we put aside the transfer from Whitbeck to Ashley and pretermit any discussion of the testimony relating to that transfer. The question then remains, was the transfer from the bank to Whitbeck a real one, or colorable and fraudulent? It is to be observed that it has been uniformly held that the fact that the purpose of the transfer was to enable the purchaser or vendee to bring suit in the Courts of the United States does not affect the question. The cases fully recognize the right to transfer or convey with just such motives as this, provided the conveyance or transfer is a real one, intended to be final without reservation, and not solely for the purpose of giving jurisdiction. This doctrine was announced in the late case of Manufacturing Co. vs. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, in which previous cases are reviewed. The motive for transfer in such cases is to be regarded as a circumstance to be considered in connection with all the other circumstances

of the case in determining whether the transfer is real. If, in a given case, the sale or transfer is real, the existence of a motive to confer jurisdiction on the Courts of the United States does not invalidate the transfer nor defeat the jurisdiction."

Again, on page 539, the Court say:

"As we have said, if the sale by the bank to Whitbeck, through Moore, must be regarded as a valid and real one, the jurisdictional conditions were then complete, and the sale by Whitbeck, already competent to sue in the Federal Courts, to Ashley, could not have made, and could not have been intended to make or create a case cognizable in the Courts of the United States."

Prior to the time of the conveyance from the trustees to this plaintiff, the trustees would have been the proper parties to have prosecuted this action, the beneficiaries are not necessary or proper parties and the citizenship of the trustees is what fixes the jurisdiction of the Federal Court, and not the citizenship of the beneficiaries.

"Where the cause of action is vested in a trustee, and the action is brought by him, his citizenship, and not that of those who are beneficially interested, determines the question of jurisdiction. Knapp vs. Troy & B. R. Co., 20 Wall. 117.

"Whitman vs. Hubbell, 30 Fed. 82; May vs. St. John, 38 Fed. 771; Goodnow vs. Litechfield, 47 Fed. 753; Reinach vs. Atlantic & G. W. R. Co., 58 Fed. 38; Ship vs. Williams, 10 C. C. A. 248, 22 U. S. App. 380, 62 Fed. 6; Popp vs. Cincinnati H. & D. R. Co., 96 Fed. 467; Cincinnati H. & D. R. Co. vs. Thiebaud, 52 C. C. A. 542, 114 Fed. 922; Hunter vs. Robbins, 117 Fed. 922.

"Where a suit to foreclose a trust deed is brought in the name of the trustee named therein,

> the fact that the beneficiary in the trust deed is a citizen of the same State as the defendant will not, if the trustee is a citizen of a different State, defeat the jurisdiction of the Federal Court. Dodge vs. Tulleys, 144 U. S. 451, 12 Sup. Ct. Rep. 728."

Again we maintain that it has been uniformly decided by the Federal Courts that persons have a right to organize a corporation even if said organization was had for the sole purpose of enabling the corporation to sue in the Federal Courts, provided, the organization was in good faith and permanent in character.

Upon this issue the burden of proof was on the appellant herein to establish to the satisfaction of the Court that the organization of this corporation was collusive and for the sole purpose of conferring jurisdiction upon the Federal Court. The only evidence upon this question which was introduced upon the trial is the stipulation of facts filed in the case. From a reading of this stipulation the Court will see that it is agreed between the parties to this action that the reasons for the organization of this corporation were many, and set forth in full in said stipulation (page 45, folio.., Tr.).

There is absolutely no evidence contained in this stipulation of facts which would justify the Court in holding the organization of this corporation collusive or in violation of the statutes of the United States in such cases made and provided.

In the case of Irvine Co. vs. Bond et al., 74 Fed. 849, (a case decided by the Circuit Court of the

Southern Division of California). The facts in the above case tending to show that the conveyance to the corporation in that case was collusive and fictitious and merely for the purpose of invoking the Federal jurisdiction were much stronger than in the case at bar. The facts, as set forth by Ross, Circuit Judge, in the opinion commencing on page 851, are as follows:

> "He sent one of his attorneys at law to the State of West Virginia for the purpose of causing to be organized under the laws of that State the complainant corporation, called the Irvine Company, with the intention of conveying to that corporation the property described in the deed executed by him to the complainant. With that end in view, one of the attorneys for James Irvine went to Charleston, W. Va., and there employed the firm of Chilton & Thayer to incorporate the Irvine Company under the laws of that State. The agreement under which that was done was that Chilton & Thayer should procure the necessary number of citizens of the State of West Virginia to execute articles of incorporation under the laws of that State, each of whom should subscribe for enough of the stock of the corporation to make their action legal and perfect the organization by the election of officers, and thereupon adopt by-laws and a seal, and then pass a resolution authorizing a meeting of the stockholders under the by-laws, to be held in Los Angeles, Cal., whereupon each of the stockholders should execute a proxy to the attorney of James Irvine, whereby he could vote their stock at such meeting. This agreement was carried out, and the Irvine Company was incorporated under the laws of West Virginia. The purposes of the company, as expressed in the articles of incorporation, were: 'Acquiring water rights, constructing waterworks and systems for distribution, use and

sale of water for irrigation, domestic use, power purposes, and other useful objects; carrying on the business of stock and general farming, and therein acquiring real and personal property, and holding, using and disposing of the same in any manner; constructing, maintaining and disposing of power plants and power systems for use, distribution and sale of dynamic energy; constructing, maintaining and operating telegraph and telephone or other lines of communication; and, in connection with its business, constructing, maintaining and operating railroads with car service to be propelled by electric or other power; and, in connection with its business, doing any and all things that a natural person might or could do with its property acquired in whatsoever manner.' The articles of incorporation provide that the corporation shall keep its principal office or place of business at Charleston, in the County of Kanawha, State of West Virginia, and recite that the incorporators 'have subscribed the sum of five hundred dollars to the capital thereof, and have paid in on said subscriptions the sum of fifty dollars, and desire the privilege of increasing the said capital by the sale of additional stock, from time to time, to five million dollars in all.' 'The capital so subscribed,' proceed the articles of incorporation, 'is divided into shares of one hundred dollars each, which are held by the undersigned respectively as follows,' that is to say: By John A. Thayer, one share; H. P. Devenshire, one share; Bilton McDonald, one share; A. W. Jackson, one share; F. H. Scott, one share—all of Charleston, West Virginia. The articles of incorporation further declare that 'the capital to be hereafter sold is to be divided into shares of the like amount.' The $50 actually paid by the incorporators, although nominally advanced by them, were so advanced under the agreement that the advances should be repaid by James Irvine, and were so repaid, as were also all other moneys

expended in and about the incorporation of the complainant company and in payment for its stock. The attorney for James Irvine immediately returned to California, with a proxy from each of the incorporators to vote their stock at a meeting to be held in California pursuant to the resolution passed in West Virginia, authorizing a meeting of the stockholders under the by-laws, to be held at Los Angeles. Prior to the holding of that meeting, one share each of the stock was issued to three persons, each of whom was in the employ of James Irvine. Those three, together with the attorney of James Irvine, who held the proxy of the West Virginia incorporators, held a meeting in Los Angeles, at which the West Virginia directors and officers, through the attorney of James Irvine, who held their proxy, tendered their resignation to the three employes of James Irvine, to whom one share of stock each had been issued. Those three accepted the resignations so tendered, and proceeded to elect themselves officers of the corporation. All of the citizens of West Virginia, who thus incorporated themselves as the Irvine Company, thus speedily dropped out of the company, and the corporation which, according to the express declaration of its articles, was required to 'keep its principal office or place of business at Charleston, in the County of Kanawha, and State of West Virginia,' and was to continue until June 1, 1944, was thus, in the year 1894, transferred to the city of Los Angeles, State of California. To the corporation thus formed, James Irvine subsequently, and on July 27, 1894, executed a deed, purporting to grant to the Irvine Company all of his right, title and interest in and to the Rancho Lomas de Santiago, and in and to the San Joaquin Rancho, and in and to the Rancho Santiago de Santa Ana, in consideration of 10,000 shares of the stock of the complainant corporation of the par value of $1,000,000, which were issued and delivered to him.

Subsequently he executed to the complainant corporation a conveyance of all of the personal property on the land described in his deed to the company in consideration of the issuance and delivery to him of 1,000 shares of the stock of the complainant corporation, of the par value of $100,000. One other share of the stock was issued to Frances Inita Irvine, wife of James Irvine, who was thereupon elected to the board of directors of the complainant company. The evidence shows that for several years prior to the organization of the complainant company James Irvine had been discussing with his counsel the advisability of organizing a corporation to which to convey the property above mentioned, having in view the development and operation of it to greater advantage than could result with the title in himself. The evidence shows that he contemplated subdividing the lands and introducing an extensive and expensive irrigation system, among other things, and that, as he was possessed of other property than that here mentioned, it would be to his advantage to cause a corporation to be formed in a State under whose laws there was no individual liability of stockholders, to which corporation he could convey this particular property in consideration of the stock of the corporation, and, through the corporation, develop and operate this property without endangering his other property. The evidence shows that another object of the proposed corporation was to secure by the corporation the right of eminent domain, the exercise of which might become necessary in furtherance of the contemplated scheme of irrigation. Another object, according to the evidence, was the securing of the right to try the title to the property, which was threatened with attack, in the Courts of the United States, through which government the title came to James Irvine. These and other considerations, the evidence shows, induced counsel of James Irvine to advise him to cause the

Irvine Company to be incorporated under the laws of the State of West Virginia, and to perform the other acts hereinbefore recited. The evidence further shows that it was never agreed or contemplated that the title to the property should be recovered to James Irvine, but, on the contrary, that the intention was that the title should remain in the corporation.

"Whatever effect, if any, the transactions attending the organization of the complainant company, and those that followed, might have in respect to the continued existence of the corporation, the Court would not be justified, I think, in view of the evidence that has been introduced, in holding that the conveyance from James Irvine to the complainant company was fictitious and not real. Being real, and intended for what it purported to be, a conveyance of the title of the property to the corporation, the power over which was thereafter vested in a board of directors, and no reconveyance to James Irvine being contemplated, the plea must be overruled. Manufacturing Co. vs. Kelly, 160 U. S. 327-336, 16 Sup. Ct. 307, and authorities there cited. An order to that effect will be entered, with leave to the defendants to answer within the usual time."

In the case of Lehigh Mining and Manufacturing Co. vs. Kelly, 160 U. S. 327, the Court say:

"None of these cases sustain the contention of the plaintiffs. All of them concur in holding that the privilege of a grantee or purchaser of property being a citizen of one of the States to invoke the jurisdiction of a Circuit Court of the United States for the protection of his rights as against a citizen of another State the value of the matter in dispute being sufficient for the purpose cannot be affected or impaired merely because of the motive that induced his grantor to convey or his vendee to sell and deliver the property provided such conveyance or such sale and delivery was a

real transaction by which the title passed without the grantor or vendor reserving or having any right or power to compel or require a reconveyance or return to him of the property in question, we adhere to that doctrine."

The fact that a complainant corporation was formed and the property transferred to it for the purpose of conferring jurisdiction upon the Federal Courts can in no way affect the jurisdiction of those Courts.

Dickerman vs. Northern Trust Co., 176 U. S. 181, 191, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; McDonald vs. Smalley, 1 Pet. 620, 7 L. ed. 287; Smith vs. Kernochen, 7 How. 198, 216, 12 L. ed. 666, 673; Barney vs. Baltimore, 6 Wall. 280, 18 L. ed. 825; Morris vs. Gilmer, 129 U. S. 315, 328, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289; Cross vs. Allen, 141 U. S. 528, 533, 35 L. ed. 843, 847, 12 Sup. Ct. Rep. 67; Crawford vs. Neal, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Lake County vs. Dudley, 173 U. S. 243, 254, 43 L. ed. 684, 689, 19 Sup. Ct. Rep. 398; South Dakota vs. North Carolina, 192 U. S. 286.

The case mainly relied upon by the appellant is Miller & Lux vs. East Side Canal & Irrig. Co., 211 U. S. 293, 53 L. ed. 189. But upon an examination of this case, the facts are entirely different and the case has no application. In the Miller and Lux case, a California corporation caused a Nevada corporation to be organized and transferred its property to the Nevada corporation. Each director of the California corporation was an incorporator of the Nevada corporation. The directors of the California corporation became and were also the directors of the Nevada corporation. Each company had the same

president, vice-president, secretary and treasurer, and offices at the same place. It was found by the Court that the said corporations "were the same in name, purposes, capitalization, directors, officers, offices and place of business." All these elements are wanting in the case at bar, and in the opinion the Court say:

> "The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation, which remained in existence with full power, as the owner of such stock, to control the operations of the Nevada corporation. If, before the institution of this suit, the California corporation had distributed among those entitled to it the stock of the Nevada corporation, issued to it as fully paid-up stock, and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case. As the facts were, when this suit was brought, the California corporation could at any time, even after this suit was concluded, have required the Nevada corporation, without any new or valuable consideration to surrender all its interest in the property which it had obtained from the California corporation for the purpose of acquiring a standing in the Circuit Court of the United States. In other words, the Nevada corporation had no real interest in the property. Its ownership was a sham, in that it could at any time after the bringing of this suit have been compelled by the California corporation to dismiss the suit and abandon all claim to the property in question. It took the title only as a matter of form, in order that the California corporation, or the stockholders interested in it, might, under the name of the Nevada corporation,

invoke the jurisdiction of the Federal Court and avoid the determination of the rights of the parties in the Courts of the State. Barney vs. Baltimore, 6 Wall. 280, 288, 18 L. ed. 825, 827. The prosecution of the suit was really for the benefit of those who were interested in the California corporation.

"We do not intend by what has been said to qualify the general rule, long established, that the jurisdiction of a Circuit Court, when based on diverse citizenship, cannot be questioned upon the ground merely that a party's motive in acquiring citizenship in the State in which he sues was to invoke the jurisdiction of a Federal Court. But that rule is attended by the condition that the acquisition of such citizenship is real, with the purpose to establish a permanent domicile in the State of which he professes to be a citizen at the time of suit, and not fictitious or pretended."

Counsel for the appellant argues that because the property was transferred to the California Land Company immediately after its organization and that that corporation immediately filed this suit to quiet title to its property that these facts are some evidence that the organization of the corporation and the transfer to it of the property was for the sole purpose of conferring jurisdiction on this Court. However, we take it that under the facts in this case no such presumption can exist. The record in the case discloses the fact that the property involved is real estate and worth over $300,000. That there was a *Lis Pendens* filed and an action pending in the State Court which cast a cloud upon the title to all of this property. It was of the utmost importance that this cloud be removed at the earliest opportunity. The corpor-

ation can not sell one acre of this land or incumber it in any way until the cloud be removed. This is the reason for the bringing of this action.

ARGUMENT ON THE MERITS.

The District Court committed no error in entering a decree quieting plaintiff's title. Under the defendant's answer and the evidence introduced upon the trial, the defendant was entitled to no relief.

Conceding only for the purpose of argument that the instrument set forth in the record and under which the complainant derived its title was in fact a mortgage, yet, the defendant having conceded in his answer (Tr. p. 13) that there is a large amount due under said trust deed or mortgage, and the evidence showing that on October 21, 1915, there was the sum of $264,400 with interest thereon due under said trust deed or mortgage (Tr. page 93, folio 102). The appellant not having made any tender of amount conceded to be due, or offered in any manner to pay any amount which the Court should find to be due, the answer is not sufficient to constitute a defense.

In Jones on Mortgages, 7th Add., Sec. 342, the rule is stated as follows:

> "A bill in equity may be maintained to redeem as from a mortgage land which the defendant holds by deed from the plaintiff upon evidence that the deed though absolute in form was really taken as security for a loan under the rule that 'he who seeks equity must do equity,' the grantor must fulfill or offer to fulfill all the obligations of a mortgagor."
>
> "The bill to redeem must make a tender of the

amount plaintiff concedes to be due on the mortgage debt, or must offer to pay whatever may be found to be due."

Jones on Mortgages, 7th Add., Sec. 1095.

"In a suit to redeem, the complaint must show a tender of the amount due before the bringing of the action or there must be an offer in the bill to pay what is due or whatever sum may be found due. To obtain equity there must be an averment of willingness and ability to do equity."

Pomeroy's Equity Jurisprudence (2nd ed.), Sec. 1219.

This rule has been announced in California in the case of Hughes vs. Davis, 40 Cal. 117. In the above case the Court say:

"The answer sets up facts showing that the transaction was a loan and mortgage to secure the payment of the money and interest. The principal sum had become due and remained unpaid. The money having become due, it was incumbent on the defendant if he desired to have the Court declare that in equity the transaction constituted a mortgage, to offer to redeem. He cannot demand equitable relief, in respect to the contract, while failing to perform his part of it. He should do equity by offering to redeem when seeking equity by having the deed declared a mortgage. There is no shadow of doubt in my mind that equity requires the defendant to pay or tender the money loaned before he deprives the plaintiff of the right of possession which flows from the deed."

In Burns vs. Hiatt, 87 Pac. 196, the Supreme Court of California say on page 197:

"The only way for a party in respondent's position to quiet a mortgage is to pay it. * * * * Respondent can have no remedy in the premises without paying or tendering the amount due ap-

pellant on his mortgages.' The same rule was previously applied in Booth vs. Hoskins, 75 Cal. 276, 17 Pac. 225, which was also an action to quiet title by a mortgagor in possession, and in which the mortgage debt was barred by the statute of limitations. In Spect. vs. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314, which was an action in ejectment by the successor of the mortgagor against a mortgagee in possession, it was pointed out that the rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. It was there said: 'Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the Court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the Court will deny him the relief he seeks, except upon the conditions that he shall do that which is consonant with equity."

In the case of Mack vs. Hill, 72 Pac. 308, the Court say:

"Appellant commences his brief with the statement that 'this action is brought to declare a deed, absolute on its face, a mortgage.' In Cowing vs. Rogers, 34 Cal. 648, the Court said: 'No precedent is cited of an action instituted for the sole purpose of having an absolute deed declared a mortgage.' This language is quoted with approval in Cline vs. Robbins, 112 Cal. 581, 44 Pac. 1023. We have searched the books diligently, but in vain, for such a case, and quite agree with the suggestion of the Supreme Court of California. The fact of declaring this deed a mortgage, and

stopping there, might compel the respondent to bring an action to foreclose it. Courts will not try lawsuits by piecemeal. They incline to the maxim: 'It is for the public good that there be an end to litigation.'

"In Cowing vs. Rogers, supra, it is said: 'If the position of the plaintiff is correct that, notwithstanding this action and a judgment in his favor declaring the deed to have been intended as a mortgage, it is necessary for the grantee to foreclose the mortgage in order to realize the money intended to be secured, then the present suit was essentially idle and useless.' And again: 'It is very clear that when he does sue, offering to redeem and praying that the premises may be reconveyed to him, the Court is authorized, if the facts warrant it, to declare that the deed, absolute in its terms, was intended as a mortgage, and to prescribe the terms of redemption and reconveyance. Such judgment is as binding upon the grantor in respect to the redemption as upon the grantee in respect to the character of the instrument and the reconveyance. It is one of the incidents of a mortgage that, where the mortgagor seeks the aid of a Court of equity in effecting a redemption, the Court may prescribe the terms of the redemption.

"If the appellant desires the Court to declare that, in equity, the transaction between himself and respondent constitutes a mortgage, he must offer to redeem. He cannot fail to perform his part of the contract and demand that equity be done. He must place himself wholly within the jurisdiction of the Court to settle the entire controversy. See Hughes vs. Davis, 40 Cal. 117. In commenting on the maxim, 'He who seeks equity must do equity,' Mr. Pomeroy observes: 'It says, in effect, that the Court will give the plaintiff the relief to which he is entitled, only upon the condition that he has given, or consents to give, the defendant such corresponding rights as he also may

be entitled to in respect of the subject-matter of the suit.' 1 Pomeroy's Equity Jurisprudence, Sec. 385. This the plaintiff has not done or offered to do."

In the case of Machold vs. Farnan, 117 Pac. 410, the Court say:

"From the holding of numerous authorities it seems that the general rule is that it is not necessary that there be any provision in the decree for the sale of the property when the Court finds the deed and agreement to be a mortgage because the action is not an action to foreclose, and therefore the usual order of sale in foreclosure cases is not required. Cowing vs. Rogers, 34 Cal. 648; Cline vs. Robbins, 112 Cal. 581, 44 Pac. 1023; Mach vs. Hill, 28 Mont. 99, 72 Pac. 307; Decker vs. Patton, 120 Ill. 464, 11 N. W. 897; Martin vs. Ratcliff, 101 Mo. 254, 13 S. W. 1051, 20 Am. St. Rep. 605; Rodman vs. Quick, 211 Ill. 546, 71 N. W. 1087."

The action referred to in the appellant's answer as being pending in the State Court was an action to have the deed to be declared in effect a mortgage and to enjoin the trustee from selling the property after the default of appellant as provided for in the trustee deed. The action in this Court is practically to the same effect, and, speaking upon these questions, the Supreme Court of California, in the case of Meetz vs. Mohr, 141 Cal. 667, 75 Pac., page 208, say:

"The plaintiff did not make any tender, nor meet defendants' offer to accept a part of the amount claimed to be due, as already stated. Under these circumstances the Court was clearly right in dissolving the injunction. 'A sale under a trust deed will not be enjoined when it appears by complainant's own showing that no sale would

be made if he should pay what he admits to be due and what he avers his ability and willingness to pay."

High on Injunctions, Sec. 452.

"From the showing made in the Court below, it clearly appears that all appellant had to do to prevent the threatened sale was to pay the testator's debt, then overdue, to the defendant, Rudolph Mohr, and which sale in case of non-payment was authorized by the deed of trust. There is no claim on the part of appellant that she has been prejudiced by the substitution of trustees, or on account of the sale not having been otherwise advertised.

"One who seeks equity must do equity, and the plaintiff in his case did not do so before bringing the action, and further failed and refused to do equity when an opportunity was offered at the hearing of the motion. The order of the Court below, therefore, dissolving the injunction, under the circumstances was right and proper."

In the case of Cline vs. Robbins, 112 Cal. 581, 44 Pac., at 1023, the Supreme Court of California, in the syllabi, say:

"An action to have a deed absolute on its face declared a mortgage, and for an accounting and other relief, is in the nature of a bill to redeem, and the decree should not be for foreclosure, but that on payment of the amount due within a reasonable time, to be fixed by the Court, the mortgage shall be adjudged to be satisfied, and that if not so paid the action shall be dismissed."

In the case of Mersfelder vs. Spring, 139 Cal. 593, 73 Pac., page 452, the Supreme Court of California, in the syllabi, say:

"Where a trust deed expressly stipulates that the recitals in the deed as to default and publica-

tion shall be conclusive proof that the condition on which the trustee is authorized to sell have been complied with, and that the deed, with such recitals, shall be conclusive against the party of the first part, and a deed given by the trustee recites compliance with such conditions, no question can arise, in an action at law involving the legal title conveyed by the trustee's deed, as to whether the conditions had been in fact complied with."

In the case of Scott vs. Lambert, which was an action to quiet title, 132 Pac. 1145, the Supreme Court of Colorado say:

"Whenever it is stipulated in the trust deed, as it is in this case, that the recitals in the trustee's deed shall be prima facie evidence of the facts therein stated, it is very generally held that the trustee's deed is admissable in evidence without extraneous proof of any matters which are recited in the trustee's deed as existing facts. Empire Co. vs. Gibson, 22 Colo. App. 617-619, 126 Pac. 1103; Webster vs. Kautz, 22 Colo. App. 111-117, 123 Pac. 139; Bent-Otero Improvement Co. vs. Whitehead, 25 Colo. 354-359, 54 Pac. 1023, 71 Am. St. Rep. 140; Jesson et al. vs. Texas Land & Loan Co., 3 Tex. Civ. App. 25, 21 S. W. 624, 626; Carey vs. Brown, 62 Cal. 373, 375; Beal vs. Blair, 33 Iowa, 318, 323; Ingle vs. Jones et al., 43 Iowa 286, 293; Savings & Loan Society vs. Deering, 66 Cal. 281, 286, 5 Pac. 353; Tartt vs. Clayton, 109 Ill. 579; 2 Jones on Mortgages (6th ed.), Sec. 1895.

"It has further been held by this and a former Court of Appeals that: 'Even where the deed of trust does not provide that the recitals in the trustee's deed shall be prima facie evidence of the facts therein stated, it is held that such recitals are prima facie proof of the matters stated in them.' Empire Co. vs. Stratton, 22 Colo. App.

577, 581, 126 Pac. 1084; Empire Co. vs. Howell, 22 Colo. App. 389-391, 125 Pac. 592; Ensley vs. Page, 13 Colo. App. 452-454, 59 Pac. 225; Carico vs. Kling, 11 Colo. App. 349, 351, 53 Pac. 390."

It has become a settled law of California that under a trust deed containing a power of sale given as security for a debt that upon default, the trustees may sell the property as provided by the terms of the instrument, and that such sale and the trustee's deed thereunder will convey a good title to the property. It is unnecessary to cite all the decisions of this State upon that question, for these trustee's deeds have always been upheld. The question was thoroughly discussed and finally decided in the case of Bank vs. Alcorn, 121 Cal. 379, 53 Pac. 813, wherein the Court say:

"The appeal is supported by very elaborate and forcible briefs, which, if the questions were open for consideration, would challenge and receive serious and careful examination; but we do not think the matter can be now considered open for discussion. Our own records will disclose the fact that trust deeds have been quite frequently used as security for loans. Their validity has been upheld in numerous cases, beginning very soon after the adoption of the Code, and continuing until the present time. Bateman vs. Burr, 57 Cal. 480; Durkin vs. Burr, 60 Cal. 360; Carey vs. Brown, 62 Cal. 373; Loan Soc. vs. Deering, 66 Cal. 281, 5 Pac. 353; Moore vs. Calkins, 95 Cal. 435, 30 Pac. 583; Loan Soc. vs. Burnett, 106 Cal. 528, 39 Pac. 922. These decisions, which have been uniform, establish a conclusion which has become a rule of property, and, however thoroughly we might now be convinced that the rule is erroneous, it should not be disturbed. Doubtless, many people

have invested their money relying upon this construction of the law by the highest tribunal of the State, while those who have executed such deeds have done so with the expectation that they would be held valid. Ruin and injustice would result from such a decision as is now sought. If the question as to whether the rule of stare decisis shall prevail be one of policy, there is here no balancing of the evil done against the good attained. The result would be evil only."

The last expression of the California Courts on this question is found in the case of Kinard vs. Kaelin, 134 Pac., on page 374, wherein the Court say:

"Finally, an attack is made upon the legality of deeds of trust. In this behalf it is urged that the power of sale usually granted in such instruments, and appearing in the deed of trust in controversy here, is voidable and legally nonavailable unless preceded by proceedings to foreclose, as in the case of an out and out mortgage. In short, it is the plaintiff's contention that the deed of trust in question must, as a matter of law, be construed and considered as a mortgage, with all of the rights, incidents and obligations thereof. Practically this same point was presented 14 years ago in the case of Sacramento Bank vs. Alcorn, 121 Cal. 379, 53 Pac. 813, and there finally and definitely decided adversely to the contention made by the plaintiffs here. The decision in that case has never been overruled, modified, or criticised. On the contrary, it has since been continuously adhered to, and it stands today as the settled law of this jurisdiction."

The declaration of trust upon which the appellee's title is founded is set forth on pages 51-64 of the Transcript. This agreement or declaration of trust has all the essential features of a trust deed and none

of those of a mortgage. It sets forth the rights of the parties; provides that in case of default that the trustee shall proceed and advertise and sell the property. It directs how the proceeds of the sale shall be distributed, and authorizes the trustee to issue a deed to the purchaser. It does not provide for any proceedings in Court for the foreclosure of this instrument, nor does it provide for any deficiency judgment.

These trust agreements have been uniformly upheld by the Courts of California. But independent of the terms and conditions of this trust agreement, we are at a loss to understand upon what theory the appellant contends that this instrument is a mortgage. A mortgage, as we understand it, is generally security for some debt or for the performance of some act on the part of the grantor and in favor of the grantee. In this case, F. F. Doane was not the grantor to Los Angeles Trust & Savings Bank and did not have title to any of the lands mentioned in the trust agreement. These lands were owned by the predecessor in interest of the California Land Company, and we are unable to understand upon what theory the appellant, F. F. Doane, hypothecated or pledged our property to pay his debt.

One important difference between a trust deed and a mortgage is that in one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit. In this case, the appellant could not have executed a mortgage upon the premises, because he could not have made the conveyance

directly to the appellee as he did not have the title to the property.

This mere statement of facts in the case, we believe sufficient to conclusively establish the fact that this trust agreement is not a mortgage.

Respectfully submitted,

ALFRED A. FRASER,

Solicitor for Appellee.